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| APPLICATION NO.   | FILING DATE | FIRST NAMED INVENTOR | ATTORNEY DOCKET NO. | CONFIRMATION NO. |
|---|-------------|----------------------|---------------------|------------------|
| 10/620,038  | 07/15/2003  | Justin Shimek        | 6126US              | 7511             |
| 30173   | 7590        | 08/23/2006           | EXAMINER            |                  |
| GENERAL MILLS, INC.<br>P.O. BOX 1113<br>MINNEAPOLIS, MN 55440 |             |                      | MAHAFKEY, KELLY J   |                  |
|   |             |                      | ART UNIT            | PAPER NUMBER     |

1761

DATE MAILED: 08/23/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

|                              |                                      |                                      |  |
|------------------------------|--------------------------------------|--------------------------------------|--|
| <b>Office Action Summary</b> | <b>Application No.</b><br>10/620,038 | <b>Applicant(s)</b><br>SHIMEK ET AL. |  |
|                              | <b>Examiner</b><br>Kelly Mahafkey    | <b>Art Unit</b><br>1761              |  |

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

#### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### Status

- 1) ☒ Responsive to communication(s) filed on 07 June 2006.
- 2a) ☒ This action is **FINAL**.                      2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

#### Disposition of Claims

- 4) ☒ Claim(s) 1-39 and 79-81 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-39 and 79-81 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

#### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

#### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All    b) ☐ Some \*    c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

#### Attachment(s)

- |   |   |
|---|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892)                        | 4) <input type="checkbox"/> Interview Summary (PTO-413)                     |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)    | Paper No(s)/Mail Date. _____  |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| Paper No(s)/Mail Date _____   | 6) <input type="checkbox"/> Other: _____                                    |

### **DETAILED ACTION**

Amendments made June 7, 2006 have been entered.

Claims 1-39 and 79-81 are pending.

#### ***Claim Rejections - 35 USC § 112***

The following is a quotation of the first paragraph of 35 U.S.C. 112:

The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same and shall set forth the best mode contemplated by the inventor of carrying out his invention.

Claims 79-81 are rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the written description requirement. The claim(s) contains subject matter which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor(s), at the time the application was filed, had possession of the claimed invention. In paragraphs 0053 and 0054 of applicants' specification, applicant discloses, "a bulk compressibility factor of at least 50% *and up to* 85%. Preferred embodiments can also have a springback factor of a minimum of 20% *and up to* 50%." Claim 79 recites, "The food product of claim 1 having a spring back factor of a minimum of 20%." Thus claim 79 claims a spring back factor range of 20-100%; the specification supports a spring back factor of 20-50%, it does not support a spring back factor of 50-100%. Claim 81 recites, "The food product of claim 1 including a bulk compressibility factor of a at least 50%." Thus claim 81 claims a bulk compressibility factor of 50-100%; the specification supports a bulk compressibility factor of 50-85%, it does not support a bulk compressibility factor of 85-100%.

Regarding the previous 112, second paragraph rejections of claims 26, 27, 30, and 31, the rejections have been withdrawn in light of applicant's amendments filed June 7, 2006.

***Claim Rejections - 35 USC § 103***

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

Claims 1-36, 38, and 79-81 are rejected under 35 U.S.C. 103(a) as being unpatentable over Zietlow et al. (US 6207216 B1) in view of Igoe (Dictionary of Food Ingredients, 4<sup>th</sup> Edition). The references and rejection are incorporated herein as cited in the office action mailed March 7, 2006.

The new limitations added by the amendments made June 7, 2006 are incorporated in claims 79-81. These limitations are related to compressibility and spring back of the final product and as such are similar to the limitations of claims 7 and 32 (previously presented) and are rejected for the same reasons as claims 7 and 32. Regarding these claims, applicant has described the product with parameters which cannot be measured by the office for prior art comparison, because the office is not equipped to manufacture prior art products and compare them for patentability purposes. Since the references teach of a composition similar to that of applicants' invention, a prima facie case of obviousness has been properly established; the burden is shifted to the applicant to show that the prior art product is different.

Claims 37 and 39 are rejected under 35 U.S.C. 103(a) as being unpatentable over Zietlow in view of Igoe, further in view of Gajewski (US 4,251,561). The references and rejection are incorporated herein as cited in the office action mailed March 7, 2006.

### ***Response to Arguments***

Applicant's arguments filed June 7, 2006 have been fully considered but they are not persuasive.

In response to applicant's argument that there is no suggestion to combine the references, the examiner recognizes that obviousness can only be established by combining or modifying the teachings of the prior art to produce the claimed invention where there is some teaching, suggestion, or motivation to do so found either in the references themselves or in the knowledge generally available to one of ordinary skill in the art. See *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988) and *In re Jones*, 958 F.2d 347, 21 USPQ2d 1941 (Fed. Cir. 1992).

- In this case, applicant claims that there is no motivation found in either the Zietlow or the Igoe reference for the addition of a softening agent to the marshmallow composition as taught by Zietlow. Applicant is referred to the previous office action paragraph 16; Zietlow, Abstract and Column 4 lines 42-51, in which Zietlow teaches, a marshmallow for use in R-T-E cereals that can comprise 0.01-25% of additional materials for the improvement of the organoleptic and visual properties of the final food product; and Igoe, pages 66 and 67, which teach a softening agent (i.e. glycerin) in order to prevent a food

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product from drying out. Thus, in order to improve the organoleptic and visual properties (i.e. maintain a moist and soft looking product) of the R-T-E marshmallow as disclosed by Zietlow, one of ordinary skill in the art at the time the invention was made would have been motivated to include glycerin (i.e. a softening agent) in the marshmallow confection as taught by Zietlow.

- In this case, applicant argues that there is no motivation to combine the bloom strength, to be utilized for a dried aerated confection, as taught by Gajewski with the aerated confection as taught by Zietlow in view of Igoe. Applicant is referred to the previous office action paragraphs 23 and 24 and Gajewski, Column 4 lines 49 through Column 5 line 50, in which Gajewski teaches that "gelatin has commonly been used in the manufacture of marshmallows and is well known in the food art... Best results are achieved when the Bloom strength is between about 250g and 300g." Thus, because both teach of gelatin in an aerated confection, because Zietlow is silent to the bloom strength of the gelatin, and because Gajewski teaches that the best results in a dried aerated confection are with a bloom strength of 250-300g, one would not only have motivation, but a reasonable expectation of success from the combination.

In response to applicant's argument that Gajewski "is not concerned with a dried aerated confection", applicant is referred to Gajewski abstract which teaches aerated confections with a moisture content of 0.5-7%.

In response to applicants' arguments that there are further distinctions between the claimed invention and the references, applicant's arguments fail to comply with 37 CFR 1.111(b) because they amount to a general allegation that the claims define a patentable invention without specifically pointing out how the language of the claims patentably distinguishes them from the references. However, regarding this subject matter, applicant is referred to the previous office action and the references incorporated therein.

### ***Conclusion***

**THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Kelly Mahafkey whose telephone number is (571) 272-2739. The examiner can normally be reached on Monday through Friday 8am-4:30pm.

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If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on (571) 272-1398. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

A handwritten signature in black ink, appearing to read 'Kelly Mahafkey', with a long, sweeping underline.

Kelly Mahafkey  
Examiner  
Art Unit 1761

A handwritten signature in black ink, appearing to read 'Keith Hendricks', with a stylized, horizontal flourish.  
**KEITH HENDRICKS**  
**PRIMARY EXAMINER**